

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VARDHMAN SHIPPING PVT. LTD

X

08 Civ. 3620(RMB)

Plaintiff,

- against -

HERNING SHIPPING AS,

Defendant.

X

**DECLARATION OF JOHN HICKS IN OPPOSITION TO DEFENDANT'S
MOTION FOR COUNTER-SECURITY**

I, John Hicks, hereby declare and say the following under penalty of perjury:

1. I make this Declaration in response to the Declaration of Nicholas Wilson dated 2nd June.
2. In paragraph 5 of his Declaration Mr. Wilson admits that the Defendant had failed to comply with Clause 65 of the Charterparty since they were in breach of their warranty to obtain at least four major oil company approvals by no later than 29th March 2007. He then seeks to justify this breach of Charterparty by the Defendants by relying upon the exclusions which appear at the end of Clause 65.
3. The first exclusion is that Owners shall not be responsible for any failure to obtain the approvals of oil majors if the vessel is trading to areas where they will not inspect a vessel. In paragraph 8 Mr. Wilson seeks to excuse the Defendant's failure to obtain the last three outstanding approvals in May 2007 because the vessel was then in West Africa. This ignores the fact that from the time of delivery on 29th November 2006 until 29th May 2007, the six month cut-off point by when all seven approvals were required to be obtained, the vessel had been trading in a series of areas where oil major approvals could easily have been obtained. I attach a schedule of movements of the vessel which I have downloaded from Lloyd's MIU which records that the vessel during that time was in Malaysia, Singapore, Indonesia, South Africa, Brazil, the United States, the Netherlands, Belgium and Canada. I note Mr. Wilson does not review the vessel's trading history or attempt to explain when or where inspections could not be carried out and I respectfully suggest that this argument must fall away entirely: it is selfevident in my submission that oil major inspections can be carried out in these countries.

4. The alternative argument put forward by Mr. Wilson under the exclusion appearing at the end of Clause 65 of the Charterparty is that the Owners shall not be responsible if the oil majors have no commercial interest in the vessel and are thus unwilling to inspect it. I cannot see anything in Mr. Wilson's Declaration which supports this line of argument either: instead he rather contradicts himself by saying in paragraphs 5/6 that four majors inspected the vessel in the space of less than a month prior to the expiry of the six month cut-off deadline but then complains in paragraph 8 that the three outstanding approvals could not be obtained in 16 days. He further says there was a lack of commercial interest on the part of the three majors whose approvals had not been obtained but no evidence whatsoever is put forward in support of this. The simple position is that the Owners warranted to obtain the approvals of all seven majors by no later than 29th March 2007 and they have not even attempted to put forward a reasoned argument as to why they were unable to obtain these approvals by that date. In spite of this they expect the Court to sympathise with them and to order countersecurity to be arranged by the Plaintiff. In my respectful submission this is not appropriate.
5. In paragraph 10 Mr. Wilson seeks to suggest that if the Plaintiff bears responsibility for a shortfall in the requisite number of approvals the vessel should not have been placed offhire at all. In so arguing he makes no effort to explain why the Plaintiff was responsible for any shortfall in approvals.
6. Paragraph 14 of Mr. Wilson's Declaration suggests that if the vessel had been put into the market on back to back terms the vessel could only have been fixed at a level such that a similar loss to the US\$1,893 per day differential would have been sustained. No evidence is put forward in support of this assertion and the very fact that the Head Owners Schulte withdrew the vessel from the Charterparty with Herning suggests otherwise that Schulte expected to be able to re-employ the vessel more profitably elsewhere: otherwise it would have been fairly simple for Schulte to take steps to oblige Herning to pay the hire due under the Head Charterparty.
7. Paragraphs 16 and 17 of Mr. Wilson's Declaration suggest that the Defendant should be entitled to recover repositioning costs which they have not incurred. I do not agree: the repositioning costs which they seek to recover would be damages for breach of Charter if the vessel had been wrongly put off hire and the charter wrongly ended. The Defendant did not own the vessel, nor as I have explained in both my first Declaration and this Declaration, do I consider the Plaintiff

wrongly put the vessel offhire. Nevertheless, the object of damages under English law is to compensate a party for its loss suffered as a result of a breach of contract by a wrongdoing party. In the present case no attempt at all is made to set out a case that the Defendant has suffered a loss. There is no explanation as to why the vessel is still in West Africa and, to the contrary in my submission, it is to be inferred as mentioned above that the vessel is presumably engaged in more lucrative employment while in West Africa. The repositioning costs, if they arose at all, would be payable in the first instance by the Defendant to the Head Owners Schulte and the Defendant would then look to the Plaintiff for an indemnity for them and it is evident the Defendant has not yet paid those costs to Schulte. Indeed the Defendant may never have to pay those costs to Schulte since Schulte has apparently not put forward any claim to recover them from the Defendant or it is has, the Defendant has been coy about disclosing such in the present proceedings.

8. There is a further important issue which Mr. Wilson has not addressed at all. Clause 65 of the Charterparty required the Defendant to obtain four approvals within 3 months and all seven approvals within 6 months and these were required to be maintained during the currency of the Charter. The sanction for breach of this obligation was that Charterers are entitled to put the vessel offhire. I explained in paragraph 6 of my First Declaration that the EXXON approval was lost on 5th June 2007 by reason of the Master's alcohol infringements. Therefore this warranty was breached. Mr. Wilson has not sought to take issue with this. Accordingly the vessel was offhire at latest from 5th June 2007 even if the Defendant established a case against the Plaintiff on other grounds, which it has not done anyway.
9. All in all I submit the Defendant has not even put forward a *prima facie* case to explain why it should be entitled to countersecurity and I respectfully request the Court to dismiss its application.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Executed on 9th June 2008

in London, England

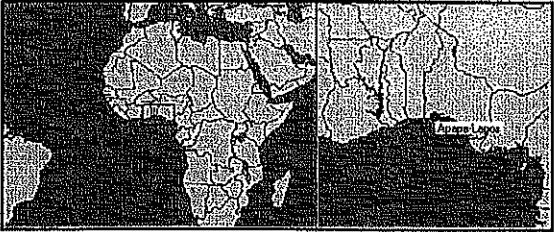

JOHN HICKS



The leader in global maritime information

Movements For: Kristina Theresa

Last Position: 09-Jun-2008 10:42:02



Apapa-Lagos, Nigeria

- 6° 18' 38.28" N – 3° 23' 44.1" E
- Distance: 7.7nm
- Speed (SOG): 6.6 knots
- Course (COG): 30°
- Click here for last AIS details

Voyage Details

- Origin:  Lome, Togo
- Destination: not available

Arrived: _____ → Place: _____ Move Type:

Sailed: _____ → Area: _____ Country:

Place		Country	Area	Arrival		Sailed		Details
  Lome	Togo	W Africa		19 May 2008		21 May 2008		
  Lome	Togo	W Africa		25 Apr 2008		27 Apr 2008		
  Lome	Togo	W Africa		25 Feb 2008		26 Feb 2008		
 Port Harcourt	Nigeria	W Africa		10 Dec 2007		14 Dec 2007		
 Houston	U.S.A.	US Gulf		16 Nov 2007	06:10	Before 10 Dec 2007		
 New Orleans	U.S.A.	US Gulf		11 Nov 2007	04:25	14 Nov 2007	16:30	
 Panama Canal	Panama	Central America		07 Nov 2007	03:29	07 Nov 2007	03:29	Passed East
 Puerto Quetzal	Guatemala	Central America		After 30 Oct 2007		03 Nov 2007	16:00	
 Balboa	Panama	Central America		29 Oct 2007		30 Oct 2007		
 Buenaventura	Colombia	S America - Pacific		14 Oct 2007		15 Oct 2007		
 Manta	Ecuador	S America - Pacific		12 Oct 2007		13 Oct 2007		
 Paramonga	Peru	S America - Pacific		After 01 Oct 2007		Before 12 Oct 2007		
 San Vicente	Chile	S America - Pacific		29 Sep 2007	18:00	01 Oct 2007	10:30	
 Talcahuano	Chile	S America - Pacific		27 Sep 2007	01:00	Before 29 Sep 2007		
 Quintero	Chile	S America - Pacific		25 Sep 2007	06:00	Before 27 Sep 2007		

	Houston	U.S.A.	US Gulf	27 Aug 2007	11:20	Before 02 Sep 2007		
	Quebec	Canada	Great Lakes - Canada	About 05 Aug 2007		About 05 Aug 2007		
	Quebec	Canada	Great Lakes - Canada	02 Aug 2007		About 03 Aug 2007		
	Quebec	Canada	Great Lakes - Canada	About 31 Jul 2007		About 02 Aug 2007		
	Quebec	Canada	Great Lakes - Canada	About 29 Jul 2007		About 29 Jul 2007		
	Montreal	Canada	Great Lakes - Canada	About 28 Jul 2007		About 28 Jul 2007		
	Quebec	Canada	Great Lakes - Canada	After 20 Jul 2007		About 27 Jul 2007		
	Quebec	Canada	Great Lakes - Canada	After 19 Jul 2007		About 20 Jul 2007		
	Quebec	Canada	Great Lakes - Canada	About 19 Jul 2007		About 19 Jul 2007		
	Quebec	Canada	Great Lakes - Canada	About 12 Jul 2007		Before 19 Jul 2007		
	New York	U.S.A.	US Atlantic	27 Jun 2007		29 Jun 2007		
	Pointe aux Trembles	Canada	Great Lakes - Canada	About 19 Jun 2007		About 21 Jun 2007		Anchoring
	Marcus Hook	U.S.A.	US Atlantic	11 Jun 2007	16:01	11 Jun 2007	20:44	
	Mantua Anch.	U.S.A.	US Atlantic	11 Jun 2007	11:36	11 Jun 2007	14:50	Anchoring
	Westville	U.S.A.	US Atlantic	09 Jun 2007	23:58	11 Jun 2007	10:40	
	Portland(ME USA)	U.S.A.	US Atlantic	29 Apr 2007		29 Apr 2007		
	Montreal	Canada	Great Lakes - Canada	About 15 Apr 2007		About 16 Apr 2007		
	Dover Strait	U.K.	UK/Eire	03 Apr 2007		03 Apr 2007		Passed West
	Ghent	Belgium	N Cont Europe	01 Apr 2007	11:44	03 Apr 2007	18:16	
	Rotterdam	Netherlands	N Cont Europe	28 Mar 2007	07:40	31 Mar 2007	04:55	
	Corpus Christi	U.S.A.	US Gulf	09 Mar 2007	07:35	10 Mar 2007	14:35	
	New York	U.S.A.	US Atlantic	28 Feb 2007		03 Mar 2007		
	Santos	Brazil	S America - Atlantic	09 Feb 2007	19:35	11 Feb 2007	21:20	
	Matadi	Congo	W Africa	After 16 Jan 2007		25 Jan 2007		
	Tema	Ghana	W Africa	13 Jan 2007		16 Jan 2007		
	Durban	South Africa	S & E Africa	03 Jan 2007		03 Jan 2007		
	Belawan	Indonesia	Far East - Asean	15 Dec 2006		19 Dec 2006		
	Singapore	Singapore	Far East - Asean	14 Dec 2006		14 Dec 2006		
	Pasir Gudang	Malaysia	Far East - Asean	12 Dec 2006		13 Dec 2006		
	Sandakan	Malaysia	Far East - Asean	05 Dec 2006		08 Dec 2006		
	Tongyong	South Korea	Far East - China Sea	Before 01 Nov 2006		Before 01 Nov 2006		Launched at

If this data is incorrect, click here to provide feedback

© 2008 Informa plc, All rights reserved.

[Terms & Conditions](#) | [Privacy Statement](#)

Lloyd's and the crest are the registered trade marks
of the Society incorporated by the Lloyd's Act 1871 by the name of Lloyd's

This site is owned and operated by Informa plc ("Informa") whose registered office is Mortimer House,
37-41 Mortimer Street, London, W1T 3JH.
Registered in England and Wales Number 3099067